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IN THE

Supreme Court of the United States

October Term, 1949

No. 393	J. D. PEDIGO, *et al.*,	*Petitioners*
No. 394	A. C. CARROLL, *et al.*,	*Petitioners*
No. 395	S. T. ALRED, *et al.*,	*Petitioners*
No. 396	LOWELL E. WOMACK,	*Petitioner*
No. 397	S. T. ALRED, *et al.*,	*Petitioners*
No. 398	J. D. PEDIGO, *et al.*,	*Petitioners*
No. 399	LOWELL E. WOMACK,	*Petitioner*

v.

CELANESE CORPORATION OF AMERICA,
Respondent

BRIEF ON BEHALF OF RESPONDENT

BARRY WRIGHT,
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Rome, Ga.

Rome Printing Company

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CELANESE CORPORATION OF AMERICA,
Respondent

MOTION TO DISMISS

Now comes the respondent and moves to dismiss the petition for certiorari because the record as filed therein does not contain a true and correct copy of the record of the cases in the court below.

STATEMENT OF FACTS

On the 25th day of October, 1948, Celanese Corporation of America, the respondent herein, presented to the Judge of the Superior Court of Floyd County, Georgia a petition asking for an injunction (R. 135) against certain striking employees from carrying out their threats to engage in mass picketing in violation of the law of Georgia, and in other violence and intimidation.

The Judge the same day granted a temporary restraining order, and set the matter to be heard on the 30th of October (R. 142). At that time the hearing was continued or postponed.

On October 26, November 18 and November 25, 1948 the Company filed sworn statements as to violations of the injunction or temporary restraining order by the petitioners in this case, showing various acts which were alleged to constitute contempt of court, and asking that citation issue directed to the respondents requiring them to be and appear at a time and place stated, then and there to show cause, if any they could, "why they should not be adjudged in contempt of the orders and processes of the court and punished accordingly."

These citations for contempt of court were No. 3234, which is now cases No. 16581, No. 393 of this court; and No. 16582, No. 349 of this court; and petition for citation for contempt of court No. 3249, which is case No. 16583, No. 395 in this court; and petition for citation for contempt of court No. 3258, which is case No. 16584, No. 396 in this court.

The court issued orders, directed to the respondents, which is substantially the same in each of said cases; and which directed the respondents to show cause at a time and place fixed "why they should not be adjudged in contempt of the orders and processes of this court and punished accordingly."

Thereafter case No. 393 came on to be tried on the 17th day of November, and the respondents were then "found guilty of contempt of the order of this court as alleged in the within petition for citation," (R. 5), and were then ordered "to pay to the proper officer of

this court a fine of $200.00, and that each be confined in the jail of said county for twenty days."

On the 18th day of November case No. 394 came on to be heard, and after hearing the evidence and argument of the counsel the court found the respondents "guilty of contempt of the order of this court as alleged in the within petition for citation," (R. 76), and sentenced them to a fine of $100.00 and ten days in jail, the fine to be paid to the proper officer of the court.

And on the 16th day of December, 1948 case No. 395 came on to be heard, and the court found certain of the respondents therein "guilty of the order of this court as alleged in the within petition for citation" (R. 150), and imposed various sentences, some a combination of a fine and jail sentences, others a fine. The fines in each instance to be paid to the proper officer of the court.

And in case No. 396 the court also found the respondents "guilty of the orders of this court as alleged in the within petition for citation for contempt of this court" (R. 197), and imposed fines and jail sentences as in the other cases.

Thereafter the respondents filed bills of exceptions to the judgments of contempt to review the cases solely on the merits and on the overruling of the demurrers of the defendants.

The strike was settled by the parties on December 8, and a stipulation of settlement was entered into by the said parties. A portion of said stipulation is as follows:

> "7. The company will ask that the petition for injunction and all citations for contempt of court filed in the Superior Court of said County not yet heard by the court be dismissed with one half the costs . . .

"8. The Company will neither oppose nor propose modification, withdrawal or stay of sentences on those already adjudged in contempt of court, but if the Judge of the Superior Court refuses to modify, withdraw or stay such sentences the company will file briefs in the appellate courts in support of its original contentions in such cases. Court costs in such cases shall be determined by the court." (R. 254.)

Thereafter the court entered an order (R. 246) dismissing the citations not yet tried and dismissing the petition for injunction, except as to cases No. 3234, 3249 and 3258 (393, 394, 395, 396), and to those respondents in said citations who have been adjudged guilty of contempt of court. Said order being as follows:

"The within case is hereby dismissed, together with all citations for contempt of court not yet tried, except that the same is not dismissed, and the court hereby expressly retains jurisdiction of said cause insofar as it pertains to citations for contempt of court docketed as No. 3234, 3249 and 3258, and to those respondents in said citations who have been adjudged guilty of contempt of court and on whom sentence has been passed, to-wit: (here the respondents who have been adjudged guilty of contempt of court were named. The names of the petitioners herein were all included in this order.), and said cause as to said cases and respondents is not dismissed. This 17th day of December, 1948.

"H. E. Nichols, J. S. C. R. C."

It will be observed that respondent here did not agree to dismiss the main case or citations that had not been heard at that time, but simply agreed that the company will "*ask*" that the petition for injunction and all citations for contempt of court *not yet heard* be dismissed.

And that by paragraph 8 of this stipulation provided that *the company would take no stand* on the question of modification, withdrawal or stay of sentence on those already convicted and sentenced.

It is to be observed that *the court refused to dismiss the case, but* on the other hand *expressly retained jurisdiction* of the case insofar as it pertained to these respondents and the cases in which they were convicted of contempt.

The petitioners then filed their petitions for stay of sentence and judgment, and it is obvious that the court did not consider the sentences that it had passed as being sentences for civil contempt, for had the court considered the contempts as civil then certainly the court would have permitted dismissal of all citations, the withdrawal of the sentences and would have granted the petitions to permanently stay the sentences, and so on.

The court upon hearing the petitions to permanently stay passed an order denying them on the 7th day of January, 1949, and thereafter bills of exceptions were duly filed. The case was then carried to the Supreme Court of the State of Georgia, and decided by that court on May 13, and June 15, 1949.

The petitioners here filed motions for rehearing, which were denied.

QUESTIONS OF JURISDICTION

The respondents bring this petition for certiorari, complaining that they have been denied due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States in four particulars.

First: That the contempts were civil contempts, and that when the strike was terminated the cause became moot, (At this point we wish to respectfully call the court's attention to a misstatement on page 3 of the petitioner's brief—"The main cause became moot and was dismissed."—as this is not a correct statement. The order of the court "expressly retains jurisdiction".) and that to execute the judgment of contempt after the main cause became moot would deprive the petitioners of due process of law.

Second: That only by the decision of the Supreme Court of Georgia did the petitioners learn that the contempt proceedings were criminal rather than civil, and that therefore they were not informed of the nature of the charges against them and did not allow them an opportunity to defend the charges made against them.

Third: That if the contempts were criminal, a certification by the trial court that the evidence preponderated against them and the absence of a finding that they were guilty beyond a reasonable doubt was in violation of due process of law.

Fourth: That if the contempts were criminals, they were denied the right of confrontation of witnesses against them in violation of due process of law.

The first claim was set up in the petition to stay the sentences. The second, third and fourth claims were set up in the petitions for rehearing.

It, therefore, appears that the only claims of jurisdiction for this court is the violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

CITATION OF AUTHORITIES

Due process of law in the state courts is regulated by the law of the state. In this respect, this court in an opinion by Mr. Justice Waite stated:

> "Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Art. VI. Const. Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States."
>
> Walker v. Sauvinet, 92 U. S. 90; 23 L. Ed. 678, 679.

The question of due process of law is for State determination and not for determination by this Court. What is for determination by this Court is as stated by this Court in an opinion by Mr. Justice Van Devanter in the case of Herbert v. State of Louisiana, 272 U. S. 312, 316; 71 L. Ed. 270, 273:

> "Whether State statutes shall be construed one way or another is a State question, the final decision of which rests with the courts of the State. The due process of law clause in the 14th Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the State Courts on questions of State law. What it does require is that State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and jus-

> tice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' "

It would, therefore, seem that the only question in this case is whether or not the action of the State Courts was inconsistent with the fundamental principles of liberty and justice as stated above.

If the action of the State Court is consistent with the fundamental principles of liberty and justice, then this Court has no jurisdiction.

We will, therefore, discuss this in order of the jurisdictional claims as set out in the petition.

First: Were the contempts of the main cause rendered moot by the settlement of the strike; so that the execution of contempt sentences would be inconsistent with the fundamental principles of liberty and justice?

Let us call the Court's attention to the order on the petition for injunction which the petitioner's contend dismissed the case (R. 246). It is as follows:

> "The within case is hereby dismissed, together with all citations for contempt of court not yet tried, except that the same is not dismissed, and the court hereby expressly retains jurisdiction of said cause insofar as it pertains to citations for contempt of Court docketed as Numbers 3234, 3249 and 3258 and to those respondents in said citations who have been adjudged guilty of contempt of Court and on whom sentence has been passed, to-wit: Joe D. Pedigo, J. L. Bowman, Troy Cline, Davis Whorton, E. J. Ellis, C. L. Ross, A. C. Carroll, H. D. Dodd, S. T. Alred, Chesley Gaines, Billie Marion Ingram, Joe Poole, W. S. Robertson, W. V. Smith, Hubert Summerville, Jack Thomas, Lowell E. Womack, Oscar T. Locklear, John Bolin, J. W. Williamon, Donald Pierce , and said cause as to

said cases and respondents is not dismissed.
"This 17th day of December, 1948.

"H. E. Nichols, J. S. C. R. C."

In the case of Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 451; 55 L. Ed. 797, 810, this Court said:

> "When the main case was settled, every proceeding which was *dependent on it, or a part of it, was also necessarily settled, of course, without prejudice to the power and right of the court to punish for contempt by proper proceedings.* Worden v. Searls, 121 U. S. 27, L. Ed. 858, 7 Sup. Ct. Rep. 814. If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the Court, with the public on one side and the defendants on the other, it could not in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation. (Italics supplied.)
>
> "But, as we have shown, this was a proceeding in equity, for civil contempt, *where the only remedial relief possible was a fine, payable to the complainant.* The company prayed 'for such relief as the nature of its case may require,' and when the main cause was terminated by a settlement of all the differences between the parties, the complainant did not require, and was not entitled to, any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part." (Italics supplied.)

There was no remedial relief in these contempt cases in favor of this respondent. The only possible sentence was a maximum fine of $200.00, payable to the State, and a maximum jail sentence of twenty days, either or both.

The Supreme Court of Georgia gave consideration to this case and to the difference in the two cases in its decision. The Court says (R. 326):

> "Without enumerating the many points of difference, we merely call attention to the conduct of the parties in the various Courts as outlined in that decision, and the prayers of the petition for citation in that case (Gompers v. Buck's Stove, etc.) as compared with the prayer in the instant case.
>
> "In the present case, the only prayer in the petition for citation was that the respondents show cause why they 'should not be adjudged in contempt of the orders and process of this court and be punished accordingly.' This prayer did not indicate that the plaintiff was asking that the respondents be punished as for a civil contempt."

The Court also said (R. 327):

> "Moreover, regardless of what may be the law in other jurisdiction, we are of the opinion that the procedure adopted in this case was a proper method under the law of Georgia for requiring respondents to answer for alleged criminal contempt. *A petition for rule nisi or citation brought by the original plaintiff, entitled in the main cause, has long been recognized in this state* as a proper method of procedure, even though it may appear that the alleged contempt arose in violation of an injunction and was criminal or quasi criminal in nature." (Italics supplied.)

In the case of United States v. United Mine Workers of America, 330 U. S. 258, 297; 91 L. ed. 884, 914, this Court held that criminal contempt was sufficiently charged when the petition alleged "a willful violation of the restraining order," and both petition and the rule to show cause inquired as to why the defendants

should not be "punished as and for a contempt of court."

This being a case brought in the Courts of the State of Georgia, subject to the laws of Georgia, the procedure of the State of Georgia governs.

Therefore, under the decision of the Supreme Court of Georgia, these contempt proceedings could not have been affected by any settlement between the parties to the equity cause made in this private litigation, as was stated in Gompers v. Buck's Stove and Range Co. (supra).

It was recognized by the parties at the time of the settlement of the strike on December 8, 1948, that the Celanese Corporation of America did not have the right to dismiss either the pending citation for contempt of court or to modify, vacate or suspend the execution of the sentences for conviction of contempt. Paragraphs 7 and 8 of the settlement agreement are as follows (R. 254):

> "7. The company will *ask* that the petition for injunction and all citation for contempt of court filed in the Superior Court of said County not yet heard by the court be dismissed with one half the costs . . ."
>
> "8. The company will neither oppose or propose modification, withdrawal or stay of sentence on those already adjudged in contempt of court, but if the Judge of the Superior Court refuses to modify, withdraw or stay such sentences the company will file briefs in the Appellate Courts in support of its original contentions in such cases. Court costs in such cases shall be determined by the Court."

The parties recognized at the time this agreement was made that these citations and convictions of con-

tempt were matters for the court and not the parties to pass on. That they were of a criminal nature and not a civil nature, and could not be dismissed by the parties.

We find no citation of authorities in the brief of the petitioners in support of their position that this case has, by the order (R. 246), become moot. We find no cases elsewhere holding such a case as this to be moot.

However, this Court has said in United States v. United Mine Workers of America, 330 U. S. 258, 294, 91 L. ed. 884, 913:

> "Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, Worden v. Searls, 121 U. S. 14, 30 L. ed. 853, 7 S. Ct. 814 (1887) or though the basic action has become moot, Gompers v. Buck's Stove & Range Co."

Second: It is claimed in the petition for certiorari that the decision of the Supreme Court of Georgia holding the contempts to be criminal was retroactive, did not inform the petitioners of the charges against them, and therefore deprived them of due process of law.

The brief of plaintiffs contains a very forceful and binding statement of this Court, in the case of United States v. Mine Workers of America, 330 U. S. 258, 303:

> "One who defies the public authority and willfully refuses obedience, does so at his peril."

And again the petitioners say (page 16 of their brief):

> "So clear was it to Holmes, J., that criminal contempt in violation of a labor injunction was a crime that 'If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech.' " (Gompers v. United States, 233 U. S. 604, 610.)

It is respectfully submitted that all of the acts for which these parties were found guilty of contempt were willfully committed, with scorn and despising. We respectfully submit that such attitude is carried over into petitioners' brief when they say (on page 10) "What was at one time the extraordinary writ of injunction has now become in the state courts a commonplace process for the attempted resolution of labor disputes. *The inevitable contempt proceedings following the issuance of the writ . . .*" (Italics added.) Were it the intention to observe the injunction, to recognize the public authority rather than to willfully refuse obedience, to defy the public authority, the contempt proceedings *would certainly not be inevitable.*

This Court has held many times that the reversal of a former decision by a State Court to the prejudice of one party does not take away his property without due process of law.

This Court in Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 95, said:

> "Where the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States."

In Tidal Oil Co. v. Flanagan, 263 U. S. 444, 450, 68 L. Ed. 382, 385, the Court said:

> "The parties to this action have been fully heard in the State Court, in the regular course of judicial proceedings, and in such a case the mere fact that the State Court reversed a former decision, to the prejudice of one party, does not take away his property without due process of law. This was ex-

> pressly held in the case of Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80."

And in Brinkerhoof-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680, 74 L. ed. 1107, 1113, this Court said:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court."

Therefore, it would certainly seem to be well established by this Court, that the overruling of an erroneous decision of the Supreme Court of the State of Georgia by that Court does not deprive these petitioners of due process of law under the Fourteenth Amendment of the United States Constitution, and does not confer any jurisdiction on this Court.

In any event, the only questions were:

a. Was the nature of the charges set out so as to give the petitioners notice of the charges against them?

b. Were the petitioners deprived of any right to defend?

a. The nature of the charge against each of the petitioners was clearly and distinctly set out in the petition for citation of contempt. Such petitions for cita-

tion fully and fairly informed the petitioners herein of the charges and the nature of the charges against them.

In the case of Pedigo and Ross, No. 393, in the petition for citation for contempt of court it was alleged (R. 1):

> "3rd. With knowledge of said restraining order, the said Pedigo and Ross willfully violated the same . . ."

and (R. 2):

> "In this way the said Pedigo and Ross collaborated together to induce strikers and union members to violate the terms of said order, and to show and exhibit contempt of this court and its process."

The prayer of the petition was (R. 3):

> "That citation issue directed to the respondents named herein, and to each of them, requiring them to be and appear at a time and place stated, then and there to show cause, if any they can, why they should not be adjudged in contempt of the orders and processes of this court and punished accordingly."

The order of the court issued and served on each of such respondents directed the respondents therein to (R. 3) show cause:

> "why they should not be adjudged in contempt of the orders of this court and punished accordingly."

As to Carroll and Dodd, Case No. 394, the petition for citation and the order of the court are one and the same as No. 393. The allegations as to Carroll and Dodd are (R. 2):

> "In direct violation of the restraining order and injunction granted in such proceedings . . ."

In Case No. 395 the allegations are as follows:

> "That an attorney for said plaintiff was present and told said named defendants that there was a restraining order by the Superior Court of Floyd County, Georgia restraining them from interfering with said train or from blocking the entrance to said plant. The said Alred then replied: 'We don't give a goddamn about any injunction, we ain't going to move. The train is bigger than we are and he can run over us if he wants to, but they ain't going to move this sign and you ain't either.'"

And continuing the allegations:

> "That all of said defendants were then, notwithstanding said injunction, massed in and on said tracks and did by force prevent said train from entering plaintiff's plant."

The prayers of the petition and the order of the court are practically identical with case No. 393 (R. 149-150).

In case No. 396, the allegations as to Lowell Womack are (R. 195) that "notwithstanding such restraining order and injunction," Womack did certain acts there set out, "in violation of said restraining order and in utter contempt of this court."

The prayers of the petition and the order of the court are practically identical with those of case No. 393 (R. 196).

To each petition for citation the respondents named filed demurrers, but none sought to attack the petition or the nisi for failure to inform of the charges against them or of the nature of such charges.

In an opinion delivered by Mr. Chief Justice Vinson, in the case of United States v. United Mine Workers of America, 330 U. S. 258, 296; 91 L. Ed. 884, 914, the Court said:

"The rule requires criminal contempt to be prosecuted on notice stating the essential facts constituting the contempt charged. In this respect, there was compliance with the rule there. Notice was given by a rule to show cause served upon defendants together with the Government's petition and supporting affidavit . . . The petition itself charged a violation of the outstanding restraining order, and the affidavit alleged in detail a failure to withdraw the notice of November 15, the cessation of work in the mines, and the consequent interference with the governmental functions and the jurisdiction of the court. *The defendants were fairly and completely apprised of the evidence and conduct constituting the contempt charge.* . . . The petition alleged a willful violation of the restraining order and both the petition and the rule to show cause inquired as to why the defendants should not be 'punished as and for contempt' of court. But nowhere was the contempt described as criminal as required by the rule.

"Nevertheless, the defendants were quite aware that a criminal contempt was charged."

In these cases now before the Court the petition alleged a willful violation of the restraining order, and both the petition and the rule to show cause inquired as to why the defendants should not be "adjudged in contempt of the orders and process of this court and punished accordingly."

43 Columbia Law Review, 780, 789, 790 (1943) contains an article on contempt of injunction, civil and criminal, in which it is said:

"It could be well argued that the use of the word 'punished' in the petition and rule to show cause was in itself adequate notice, for 'punishment' has been said to be the magic word indicating a proceeding in criminal rather than civil, contempt."

There was only one type of punishment possible in these cases. That is, the respondents in the contempt proceedings could only be punished by a fine payable to the State of Georgia and imprisonment. There was no punishment that could have been imposed that would have been for the benefit of the Celanese Corporation of America.

b. It is respectfully submitted that the procedure followed in this case was the procedure required by the State of Georgia, and was that followed in the cases prior to this. The only cases held to be civil contempt were where the remedy in the contempt proceeding was for the exclusive benefit of the plaintiff. Livingston v. Livingston, 24 Ga. 379, 383. And in Cobb v. Black, 34 Ga. 166, 167, the court said:

> "The object in this case is not to punish for an act done, in contempt of the court, but to compel the doing of an act necessary to the administration of justice."

These two cases recognize the distinction. In Drakeford v. Adams, 98 Ga. 722, 724, the court said:

> "A distinction is made between cases in which the proceeding is merely punitive and those in which it is remedial, that is to say in which the contempt consists in the refusal by a party to do something which he is ordered to do for the benefit or advantage of the opposite party, and he stands committed until he complies with the order. The substantial distinction, as stated by Judge Seymour D. Thompson, is, that 'one is a mode of execution of judgments and decrees in civil cases, while the other is punishment for an offense of a criminal nature.'"

It is true that the Supreme Court of the State of Georgia in Wagner v. Commercial Printers, 203 Ga.

held, in similar set of facts, that the contempt was civil. However, the court cited in that case the cases above cited, and states that:

> "Contempt may be civil or criminal. In the former, the proceeding in attachment is to enforce compliance with an order of court made for the protection of some right of the complaining party. In criminal contempt, the proceeding is to punish the offender for disrespect to or contumacious conduct towards the court."

In the case of Carson v. Ennis, 146 Ga. 726, 728, a proceeding to punish for the violation of an injunction, the court said:

> "It is apparent that the relator is not seeking to enforce any order made for the protection or enforcement of any private right, but to punish for alleged contumacious and disrespectful conduct towards the court in willfully disobeying the court's order. An attachment for a criminal contempt may issue to preserve the power and vindicate the dignity of courts, and to punish disobedience of their orders."

In the petition for citation for contempt no relief in behalf of the plaintiff in the injunction was prayed for. No remedy on behalf of the plaintiff in the injunction was prayed for. The only prayer was that the respondents show cause "why they should not be adjudged in contempt of the orders and processes of this court and punished accordingly."

This in itself, as stated in the United States v. United Mine Workers case, was sufficient to put the respondents on notice that they were charged with criminal contempt of court. If they acted on the belief that they were being charged with civil contempt of court in violating the orders of the court, then, as stated in this

same case of United States v. United Mine Workers, *they acted at their peril* and in utter disregard of not only the order of the court in this case, but in utter disregard of the greater number and weight of decisions of this state.

Certainly in view of the cases above cited the petitioners have not been deprived of due process of law by the Supreme Court of Georgia reversing a prior erroneous decision.

3. It is claimed that if the contempts are criminal that the certification by the trial court that the evidence preponderated against the respondents therein, and in view of the certification by the trial judge that the contempts "were heard . . . according to the rules of evidence procedure in civil cases, and at said hearing the Honorable Trial Judge found the evidence to preponderate against the petitioners," and in the absence of a finding beyond a reasonable doubt deprived the petitioners of due process of law.

The cases were not tried according to the rules of civil evidence and procedure and no such statement or certificate is contained in the bills of exceptions in cases No. 393 (16581), 394 (16582), 395 (16583) or 396 (16584) (R. 7-77-154-201). These are the cases wherein exception to the court's order finding and adjudging the petitioners herein guilty of contempt. It is to be noted that no assignments of error on the contempt orders themselves are set forth on this ground.

The Supreme Court of Georgia had this to say (R. 326):

> "It should be borne in mind that the allegations as to how the judge regarded the case, both in ruling upon evidence and in making up his decision,

> are contained in a mere petition for stay, and are not set forth as assignments of error upon the contempt orders themselves, or other judgment. Seemingly, they were made simply to reinforce the contention that the proceedings were civil contempt proceedings, but, in any view, the real character of the proceedings could not be altered by any allegation in the petition for stay as to how the trial judge may have regarded them."

There is nothing in the Fourteenth Amendment of the United States Constitution which requires proof of guilt beyond a reasonable doubt in cases of contempt of a state court tried in the state court. On the other hand, the Supreme Court of Georgia has held, in the case of Plunket v. Hamilton, 136 Ga. 72, 77, that:

> "While proceedings to attach for contempt which are punitive in their nature are sometimes spoken of as criminal, yet in many respects they are not strictly criminal cases, or subject to the rule of indictment, trial, sentence, and review, which apply to criminal cases strictly so-called."

And in the case of Carson v. Enis, 146 Ga. 726, 729, the Supreme Court of Georgia said:

> "While proceedings to attach for contempt which are punitive in their nature are sometimes spoken of as criminal, yet they are not subject in all respects to the rules of trial which apply to criminal cases, strictly so-called. Plunket v. Hamilton, 136 Ga. 72 (70 S. E. 781; 35 L. R. A. (N. S.) 583; Ann. Cas. 1912 B, 1259). Under the practice of criminal trials in this state, a defendant is permitted to make an unsworn statement, and is not subject to an involuntary cross examination. But an alleged contemnor is not entitled to this statutory right, which is given only to defendants on trial for crime preferred by indictment or accusation."

The criminal rules of trial, therefore, are not applicable in criminal contempt cases in Georgia, and proof beyond a reasonable doubt is not required.

The rule in Georgia is stated in Howard v. Durand, 36 Ga. 346, 359, and followed in Patton v. Miller, 190 Ga. 152, 195; in Corley v. Crompton-Highland Mills, Inc., 201 Ga. 333, 338.

The court said in Howard v. Durand (supra), at page 359:

> "It has often been decided that the actions of the Superior Courts in granting or refusing injunction will not be controlled except when it may appear there has been a flagrant abuse of discretion. The same rule should apply to the action of the courts relative to the punishment of parties alleged to be contumacious. Whether a contempt has been committed which should be punished, may generally be safely left to the discretion of the circuit judges."

The Court said in the Miller case:

> "In cases of contempt the trial judge is vested with a discretion in determining whether his orders have been violated and how such infringement should be treated; and it has been said that this court will not disturb his judgment unless it appears that he had abused his discretion."

The cases cited in the brief of the petitioners deal with contempt in Federal Courts, which are subject to the statutes of the United States and to the procedure prescribed for Federal Courts.

The case of Cockrill v. California, 268 U. S. 258, 69 L. Ed. 944, and Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191, cited by the petitioners, do not deal with any similar case at all, and have no application to the

present case. In the case of Bailey v. Alabama, the Court said, page 328:

> "This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. Fongu Yue Ting v. United States, 149 U. S. 698, 749; 37 L. ed. 905, 925; 13 Sup. Ct. Rep. 1016. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and where the inference is not purely arbitrary; and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue it has been held that such statutes do not violate the requirements of due process of law . . ."

In other jurisdictions it has been held that "the guilt of the accused must be established by clear and satisfactory evidence." Burtch v. Zench, 200 Iowa 49; 202 N. W. 542; 39 A. L. R. 1349, 1351. And a clear preponderance of evidence would suffice. State, ex rel. Havner v. Mullan, 185 Iowa 794, 171 N. W. 158. See in this connection the decision of the Supreme Court of Georgia on this question (R. 58, 59, 60, 61, 62), and Ex Parte Grossman, 267 U. S. 87, 117, 118, 122, 69 Law ed. 527, 534, 536, wherein the Court said:

> "Contempt proceedings are sui generis because *they are not hedged about with all the safeguards provided in the Bill of Rights for protecting one accused of ordinary crime from* the danger of unjust conviction. This is due, of course, to the fact that for years before the American Constitution, courts had been held to be inherently empowered to protect themselves and the function they perform by summary proceedings without a jury to punish disobedience of their orders and disturb-

ance of their hearings." (Italics supplied.)

and

> "The power of a court to protect itself and its usefulness by punishing contemnors is of course necessary, but it is one exercised without the restraining influence of a jury and without many of the guaranties which the Bill of Rights offers to protect the individual against unjust conviction."

It therefore seems to be true that as the Supreme Court of Georgia said (R. 58), "We think the question before is one to be determined by the internal law of this State: Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 296, 85 L. Ed. 837 (10)."

The references to the Milk Wagon Drivers case is "The Supreme Court of the United States does not have revisory power over state practice, provided such practice is not used to evade constitutional guaranties."

There is certainly no constitutional guaranty as contended by the petitioners.

4. They claim that if the contempts are criminal they were denied the *right* of confrontation of witnesses in violation of the due process of law clause.

This question was only raised in the motion for rehearing in the State Supreme Court, and was never urged at any time during the trial of any of the citations for contempt. Therefore, there is nothing in the record concerning the witnesses. The court must, therefore, presume that they were given the right to examine witnesses against them.

This Court held in In Re Oliver, 333 U. S. 257, 273; 92 L. ed. 682, 694, that:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard

> in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

This right to examine the witnesses was ever afforded the respondents in these cases. It is apparent from examination of the record that certain portions of the record in the Supreme Court of Georgia was not sent up, as required by Rule 38 of this Court, but was specifically deleted by the petitioners (see R. 359 (11) and R. 360 (10). Such portion so deleted would show that in at least one case all the witnesses against the respondents therein were cross examined by the respondents.

Since this question was never raised before, it does not seem timely now unless the respondent herein be given the opportunity of showing that the affiants in each case were in court either by request of the contemnors' counsel or by subpoenas, and were there for the purpose of being examined by the contemnors or contemnors' counsel.

For instance, the record does show that all witnesses as to Lowell E. Womack in case No. 396 in this court or 16584 in the Supreme Court of Georgia were called and were cross examined by the counsel for Womack (R. 209, 210, 211, 213, 215, 216, 222), except Roy Shell and he was present in court for the purpose of being cross examined.

The Supreme Court of Georgia has held in Warner v. Martin, 124 Ga. 287, 390, that in contempt cases:

> "The general rule seems to be, that the questions of contempt or no contempt *may be decided upon*

> *affidavits*, where the chancery rule is in force that the answer of the contemnor is not conclusive." Rapalje on Contempts, Sec. 120, 126. 'In proceedings for contempt for the violation of an injunction, the usual method of proving the fact of violation is by affidavit.' 2 High on Inj. Sec. 1452. See also 1 Beach on Inj. Sec. 262; State v. Harper's Ferry Bridge Co., 16 W. Va. 464; Una v. Dodd, 38 N. J. Eq. 460; Witter v. Lyon, 34 Wis. 564; People v. Brower, 4 Paige (N. Y.) 405; State v. Mitchell, 3 S. D. 223; Rutherford v. Metcalf, 5 Hayw. (Tenn.) 58. "So far as we know to the contrary it has been the practice in the courts of this State to admit affidavits in evidence on the hearing of proceedings for contempt for the violation of an injunction. Among the cases where such practice was followed may be cited, Howard v. Durand, 36 Ga. 346, Thweatt v. Gammell, 56 Ga. 98, and Hayden v. Phinizy, 67 Ga. 758. (Italics supplied.)

And in Falls City Mfg. Co. v. Athens Coca-Cola Co., 130 Ga. 559, 561, where affidavits were admitted in evidence over objections that they were not properly entitled, the Court said:

> "Where a proceeding in attachment is brought by one of the parties to a case, for the purpose of enforcing an interlocutory injunction granted in favor of one of the litigants against others . . . if affidavits are entitled in the name of the main case, they will not be subject to rejection from evidence on that ground, when offered on the hearing of the attachment proceeding."

There was no objection to the introduction of the affidavits, and no assignment of error on their admission in evidence, neither is there any showing whatever that the petitioners were denied the right to examine any witness or any of the affiants.

CONCLUSION

The respondent respectfully submits that this Court does not have jurisdiction to entertain this writ because no Constitutional question is involved, and no Constitutional right or privilege has been denied the petitioners.

Respectfully submitted,

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